RECENT AMERICAN DECISIONS.

Circuit Court of the United States, for the First Circuit, Rhode Island. June, 1852.

JOHN P. NESMITH *et. al. v.* THE DYEING, BLEACHING AND CALENDERING COMPANY.

1. A factor who accepts a bill, drawn against a particular consignemnt of merchandise, which has been so far executed as to be placed in the hands of a third person to be delivered to him, acquires thereby a property in the goods, which will enable him to maintain replevin against an attaching creditor of the consignor, to whom the officer making the attachment had delivered the goods.

2. No bill of lading, or other formal document, is necessary to create the title in such tase, nor is it necessary that the depository should be employed by the consignee, nor that he should know the particulars of the consignee's title.

This is an action of replevin, for a quantity of cotton cloth.

It appeared that Daggett & Co., manufacturers, at Attleborough, Mass., who had been in the habit of employing the plaintiffs as their factors in the city of New York, wrote to them on the 4th of February, 1852, that they had that day delivered 500 pieces of cloth to the defendants, to be colored into cambrics, and had directed them to insure the goods and send the plaintiffs a policy with a receipt for the goods, and requesting the plaintiffs to accept a bill which they had drawn on them at six months date. They also desired the plaintiffs to order the colors of the cloths. On the same day, Daggett & Co., wrote to the defendants, at Providence, R. I., advising them of the sending to them, by railroad, of 300 pieces of cloth, to be made by the defendants into cambrics for the plaintiffs, and to be forwarded to the plaintiffs when finished. They added that they should send 200 pieces more on that day, and desire the defendants to send to the plaintiffs that afternoon a receipt for 500 pieces, together with evidence that they were insured for the plaintiffs' account; and they inform the defendants that the plaintiffs will order the colors. On the 5th of February the defendants wrote to the plaintiffs that they had received 500 pieces of cloth from

Daggett & Co. to color, &c., for cambrics, and had at their request effected insurance thereon, payable, in case of loss, to the plaintiffs; and they applied for and obtained this insurance "for and on account of the plaintiffs' loss, if any, to be paid to them. On the 6th of February the plaintiffs wrote to Daggett & Co., acknowledging the receipt of their letter of the 4th of February, and saying they suppose the cloths are of the same quality as others they have sold, and if so they will accept the draft; and on the same day they wrote to the defendants, acknowledging the receipt of their letter of the 5th of February, and ordered the colors and mode of packing the cambrics. On the 13th of February the bill was presented to the plaintiffs for acceptance and by them accepted, it having been previously negotiated by Daggett & Co. On the 10th of March, Daggett & Co. having failed in business, the defendants caused these goods to be attached, as security for a debt which Daggett & Co. owed them; the goods were not then completely finished, and the attaching officer delivered them to the defendants.

It was agreed that upon these fact the Court should determine whether the plaintiffs can maintain their action.

The opinion of the Court was delivered by CURTIS, J.

The question is whether the plaintiffs, at the time the attachment was made, had a property in these goods which would enable them to maintain replevin, against one holding them under an attachment as the property of Daggett & Co.

The facts show that the parties intended to vest in the plaintiffs are interested in these goods as security for the reimbursement of the money which by their acceptance they engaged to pay for Daggett & Co. Independently of any particular expressions occurring in the correspondence, such an intention is fairly inferrable from the very nature of the transaction. A request made by a principal to a factor to accept a bill, because the principal has placed merchandise in the hands of a third person, to be insured for the benefit of the factor, and forwarded to him for sale, carries with it an implication that the parties intend that the factor, if he accepts, may look to the goods for his reimbursement; and if this

implication is not controlled, it is sufficient, so far as the mere intention of the parties can govern, to confer on the factor a corresponding interest in the goods. In case at bar this intent, derivable from the nature of the transaction, is not controlled, but is much strengthened by the language of the correspondence. When Daggett & Co. sent the cloths to the defendants, they informed them that they were to be made into cambrics for the plaintiffs, and forwarded to them; that they were to be insured for the plaintiffs' account, and they request the defendants to send to the plaintiffs evidence that the goods had been thus received and insured. This was accordingly done, and the bill was accepted because it was done. Now, although it is clear that a mere intent of a consignor to vest a special property in his factor, to secure him for an advance on account of a particular consignment, even if the advance is made on the faith of it, will not create any legal property in the factor, yet it is otherwise when the particular goods have been set apart, in the hands of a third person, who has undertaken to deliver them to the consignee, and the latter has advanced, or accepted, upon the faith of such an arrangement. The decisions of Court of Exchequer, in *Bryans* v. *Nix*, 4 Mee. & Wels. 775, and of the Supreme Court of New York, in *Holbrook* v. *Wright*, 24 Wend. 169, *Grosvenor* v. *Phillips*, 2 Hill, 147, fully support this position, as does also *Sumner* v. *Hamlet*, 12 Pick. 76.

It was attempted to distinguish this last mentioned case from the one now under consideration, because the parties there both agreed that the depositary should act as the plaintiffs' agent; but I consider that in this case, although Daggett & Co. originally employed the defendants, and were to pay them for finishing the goods, yet when the plaintiffs were apprised that the defendants held the goods for them and assented thereto, and when the defendants were informed that the goods were to be finished for and sent to the plaintiffs, and by accepting the goods for these purposes gave their assent to execute them, all parties, including the defendants, agreed that the defendants should act as the plaintiffs' agents so far as respected the custody for and delivery to the plaintiffs of these goods.

It is true the defendants did not know why the goods were to be delivered to the plaintiffs. The information given to them by Daggett & Co., when the goods were sent, that they were to be finished for and sent to the plaintiffs, and insured for their account, would rather indicate that the plaintiffs were the absolute purchasers. But this is not material. It is not necessary that they should know the inducement which led to the arrangement, or the particulars of the plaintiffs' title. They knew what they had themselves agreed to do, which was in effect to hold the goods for the plaintiffs, and this was sufficient. I know of no principle, or decision, which requires more; and in none of the cases referred to above, except the one in 12 Pickering, was notice to the depositary of the nature of the title of the creditor, an element in the decision. If the depositary undertakes to act for a third person, and receives the property under such an undertaking, he must execute it, unless prevented by a process of law founded on a title superior to that of his principal, and it is not for him to say he did not know that his principal had a good title.

This would be otherwise, if notice to the depositary were a necessary element in the title of the consignee; but it is not. That title rests upon the intent of the parties to create and vest a property in the goods, upon the valuable consideration parted with by the factor on the faith of that property, and upon the execution of that intent by setting apart the particular goods in the hands of a third person, to hold for the factor; thus placing them out of the control of the general owner, and within the control of the factor, so that he can exercise and have the benefit of his ownership. And therefore, I am of opinion that the cases in which it has been held that a delivery to a carrier under a bill of lading consigning the goods to a factor, who has accepted an account of them, does vest a property in the factor, are all authorities in favor of the plaintiffs; for they do not depend upon any particular efficacy of a bill of lading, any further than that document manifests the intent of the parties to have the carrier hold the property for and deliver it to the factor. *Haile* v. *Smith*, 1 B. & P. 536; *Anderson* v. *Clarke*, 2 Bing. 20; *Shelpherd* v. *Pope*, 6 Alabama R. 690.

That the right of a factor to a lien cannot rest on a bill of lading alone is clear, from *Patten* v. *Thompson*, 5 M. & S. 350; and in *Rryans* v. *Nix*, 4 M. & W. 790, Mr. Baron Parke declares in terms what that case required, that there is no difference as respects this question, between a bill of lading and any other competent evidence of the purpose and acts of the parties.

Perhaps some confusion exists from confounding the property acquired by such an arrangement as was made in this case, with the lien of a factor. It is correctly said, that actual possession by the factor is necessary to his lien; and when the goods have been placed in the hands of a depositary employed by the owner, to be delivered afterwards into the actual possession of the factor, it can hardly be said that the latter has actual possession of the goods, and so, it is argued, he cannot have a lien as factor. But the property acquired by depositing the goods in the hands of a third person, under an agreement that they shall be delivered to one who has advanced money or negotiable paper on account of them, and shall be by him sold, is something more than a lien. The legal title to the property may be considered as passing to him for the purposes indicated by the agreement. Such is the view taken by Eyre, C. J., in the leading case of *Haile* v. *Smith*, and I perceive no sound reason for doubting its correctness. It relieves transactions of this nature from all difficulty arising from the want of actual possession by the factor, and places them upon the same footing as absolute sales to bona fide purchasers, so far as respects the vesting of the title intended to be created. In my judgment, this result is in accordance with the interests of trade, and with the usages of commerce, and allows only a just and safe effect to the agreements of parties.

My opinion is, that the plaintiffs had a property in these goods on which the action of replevin may be sustained and the judgment must be in their favor.

Judgment for Plaintiffs.

Cozzens, for Plaintiff.

Carpenter & Hoppin, for Defendants.

Circuit Court of the United States, for Third Circuit, November, 1852.

SUTTON *et al. v.* THE ALBATROSS.

1. The receipt of a new note, without a fresh consideration, is not satisfaction of an account or a waiver of a lien, unless accepted as such; and of this a receipt "in full" is only *prima facie* evidence, open to explanation. *Jones* v. *Shawham*, 4 W. & S. 263, approved.
2. A material man having a lien *in rem* against a domestic vessel, took from the owner, before all the work was completed, notes for the whole of his account against him, including repairs furnished to other vessels, and signed a receipt "in full" therefor. From the circumstances it appeared that the object of the former was not to obtain negotiable security, but to prevent a dispute about his account, and that the receipt had been given as a form, without the attention of the parties being at all drawn to it. *Held* that there was no waiver of the lien.

Appeal from the District Court of the United States, sitting in Admiralty.

This was a libel by Sutton & Co., Steam Engine and Boiler Makers, of Philadelphia, against the Steamship Albatross, a domestic vessel, for machinery and repairs furnished to her between the 15th of November, 1851, and the 1st of January, 1852, under a contract with her owners, the Philadelphia and Atlantic Steam Navigation Company; the amount claimed being about $1600.

The answer of Ambrose W. Thompson, for himself and others, assignees for creditors of the Steam Navigation Company, after setting forth the assignment, admitted that the work and materials were furnished as stated in the libel, but alleged by way of defence, that on the 16th of December, 1851, James T. Sutton, one of the Libellants, called on Thompson, then President of the Company, and requested as a personal favor, that he should be permitted to render his bill for work and materials up to that time, so that it might be examined and settled for by note, before Thompson resigned from the Presidency of the Company, as he then contemplated doing; Sutton urging as a reason for his request that although all the work was not completed, they (the Libellants) were

in want of paper, and if Thompson should resign, they might be delayed in obtaining a settlement.

The answer then stated, that persuaded by these reasons, and for the purpose of accommodating Sutton, the Respondent consented, and that Libellants accordingly furnished their bill, which embraced every item mentioned in the account annexed to the Libel, upon which four notes of different dates at four months each, were executed for its amount, in the name of the Company; and that the Libellants then gave a receipt in these words:

"Received, Philadelphia, Dec. 16, 1851, from the Philadelphia and Atlantic Steam Navigation Company, their four notes of Nov. 17th and 26th, and Dec. 6th and 16th, amounting to thirty-six hundred and forty-five dollars and eighteen cents, at four months, in full, for repairs of Steamships to this date.

$3,645 18. JAMES T. SUTTON & CO."

The answer submitted thereupon, that these notes and receipt were a waiver by the Libellants of their lien against the vessel, and that consequently that lien was forfeited and abandoned.

No formal replication appears to have been filed.

The only evidence in the case was the deposition of Samuel T. Pierce, who had been Superintendent of the Company, and in charge of their books. The material parts of his testimony are as follows:

"Mr. Thompson was President of the Company in December, 1850. I was present at an interview between Mr. Thompson and Mr. Sutton, in relation to the work on the 16th December. Mr. Sutton rendered his bill for work against both the Albatross and Osprey, up to that date, and requested that Mr. Thompson would close it by notes, previous to his resignation, and the rest of the Board; as, if that was not done, a new Board might raise some dispute or difficulty, which he wished to avoid. Mr. Thompson examined the account, and requested me to draw four notes for the amount, in equal portions, and to take Mr. Sutton's receipt for them. That is all I recollect that passed. I drew the notes and took the receipts. The notes were given at the request of Mr. Sutton, on account of the Directors being about to resign. Mr. Sut-

ton's mode of dealing, account and settlement, with the Company, six months settlements; first of January and July—for *repairs*. I say for repairs, because contracts for building are different; they are settled when they are finished.

"Mr. Sutton requested this settlement as a favor, on account of the expected resignation. He requested it prior to the usual time of settlement, for the reason I have mentioned.

"They actually resigned, subsequently, but their resignations were refused by the Stockholders."

On cross examination, the witness stated that Mr. Sutton's account was a running account; that by the words "their course of settlement" he meant what he learnt from the books, as well as his own knowledge, admitting that he had never been present at any interview between Sutton and others, on behalf of the Company, as to how he was to be paid for his work, except on the day when the notes were given; and that no notes were given under these six months settlement, except those on the contracts.

It is to be remarked, that the notes received by Sutton were never negotiated, but were brought into Court at the hearing, and surrendered; and that the receipt was a mere printed form, filled up by the Clerk.

The lien claimed by the Libellants, was given by the Acts of Assembly of Pennsylvania, of 1836 and 1837, with regard to the attachment of vessels. (Purdon's Dig. 90, 92.)

The District Court, on the hearing of the case decreed for the Libellants, for the full amount of their demand, with interest and costs; from which decree the Respondents appealed, when the case was argued by

St. Geo. T. Campbell, for Libellants.

G. M. Wharton and *Balch*, for Respondents.

GRIER J.—That the libellants had a lien on the steamboat Albatross for their bill of repairs, by the statute laws of Pennsylvania, is not disputed. The only question is, whether they have relinquished that security by taking the notes of the owners. In solving this question, there is also no difficulty as to legal questions affecting the case. Taking the note of hand of the debtor, is not, *per se*, legal

satisfaction, unless there is evidence that the parties intended it should operate as such. Where the debtor has two securities, as in the present case, it will not be easily presumed that he has voluntarily relinquished one of them, and that the best of the two.

The giving the receipt for the notes, as in full of the account, it is true, is *prima facie* evidence, that such was the case. But a receipt is no estoppel; and when we consider how little attention is usually paid to the peculiar form or expression of such documents, signed by mechanics, and drawn up by the clerk of the employer, such formal words may be easily rebutted, by showing the true nature of the transaction. The note taken is no higher security than the account, and unless the transaction shows an intention to surrender without consideration, the better security, these formal words in a receipt given, when the account is settled, ought not to be considered as at all conclusive of an intention to receive the lesser security as satisfaction. The case of *Jones vs. Shawhan*, 4 Watts & Serg. 263, is directly in point, and states the law as applicable to this case. The law as laid down in that case is this—a new note without a fresh consideration, is not satisfaction of an account, or of a preceding note, *unless it has been accepted as such;* and though the presumption is, that a larger security is not exchanged for a smaller one, yet a receipt taken for the lesser security, as "*in full,*" is but evidence to go to the jury to subvert such presumption. But it is not conclusive, and when opposed by the presumption, it may be explained by showing that there was no contract to take the lesser security and release the better, and that the intention to accept it as satisfaction, and relinquishment of another security, was not in the contemplation of the parties. In this Court, the duty of finding these facts, cannot be devolved on a jury; and on careful examination of the evidence, I am convinced that the libellant when he signed the receipt, had not the idea before his mind, of releasing any security held by him; nor did the officer with whom this settlement was made, contract for any such release, or that the notes should be received in actual satisfaction.

In the first place, it does not appear that notes were demanded for the purpose of having a merchantable security on which to raise

money, or that they were used for that purpose. They are brought into Court and surrendered. Secondly, the libellants called for a settlement of their accounts, not for the purpose of getting immediate payment, by note, but to have the account settled and adjusted before Mr. Thompson and the officers who had dealt with libellant, should send in their threatened resignations. The notes were given as evidence of the amounts of the balance due on settlement, says the witness "on account of the Directors being about to resign." When the account was stated and adjusted with the President of the Company, he ordered the clerk to draw these notes and take a receipt of them. No direction was given to the clerk in what form to draw the receipts, either by Thompson or Sutton. The clerk drew it in the usual form. Sutton signed it without noticing its form, or perhaps reading it. His object was to get his account *settled*, so that he might not have difficulty with the officers of the corporation. No suggestion was made by either party, that these notes were either wanted to raise money on, or given as favors, or received as a satisfaction of and other security held by the mechanic.

There was no consideration given, or intended to be given for the relinquishment of one of the mechanics' securities, nor did such an act enter into the contemplation of either of the parties at the time of the settlement. The clerk drew the receipt in the usual form in his receipt book, without any instruction from either party to put it in any particular form, and thus made it have an apparent effect which was not within the scope of the contract, or contemplation of the parties.

Upon a more careful examination of the case, I feel satisfied that a jury would have been justified in finding that it was not the intention of the parties to this settlement, to give or receive these notes in satisfaction of the debt, so as to relinquish the security on the vessel, given by law to the libellants.

The judgment of the District Court is therefore affirmed.[1]

[1] The authorities on the question of the effect of a negotiable security taken for an antecedent debt, which are numerous and conflicting, are collected and ably discussed in the notes to Cumber v. Wain, 1 Smith, L. Cases, [146]; and to Swift v. Tyson, 1 Am. Lead. Ca. 191.

New York Supreme Court, Shankland, Mason, Gray and Crippen, J. J. May Term, 1852.

AUGUSTUS MORGAN *v.* JOHN FREES.

Evidence is admissible to show that the principal witness for one of the parties in a cause, had been guilty of an attempt at subornation of perjury therein, in order to affect his credibility. Harris v. Tippett, 2 Campb. 637, and People v. Genning, 11 Wend. 18 doubted.

This was an action to recover damages for a breach of warranty, on the sale of a horse.

Benjamin T. Miller, a witness for the plaintiff, and who had acted as his agent in the purchase, having testified to the warranty, and breach, was asked, on his cross-examination, whether he did not attempt to hire one Webster to impeach a witness who was called for the defendant to disprove the alleged warranty. Miller swore that he did not. The defendant then called the said Webster as a witness, and proposed to prove by him that said Miller had made such attempt to suborn him. This wos objected to by plaintiff's counsel, and excluded by the Court, and the defendant excepted to such ruling.

SHANKLAND, J., (after stating the facts:)

I am of opinion that the evidence was proper, and should have been received. It directly tended to depreciate the credibility of the witness.

It is true, that in *Harris* v. *Tippett*, (2 Campb. 637,) Lawrence, J., held, that on a witness denying that he had dissuaded another witness on the opposite side from being present on the trial, evidence to contradict him on that point would not be admissible; but in *Yewin's* case, (2 Campb. 638,) the same Judge held, that it was not irrelevant, on the trial of a prisoner, to cross-examine the witness to the fact, whether in consequence of being charged with robbing the prisoner, he had not said that he would be revenged upon him, and that, if the witness denied using such a threat, evi-

dence might be given to contradict him. Whether the above decisions can both stand together, is doubtful, but most clearly, that first one is not sustained by the prior and subsequent cases, nor by principle.

On the trial of Lord Stafford, proof was admitted, on the part of the prisoner, that Dugdale, one of the witnesses for the prosecution, had endeavored to suborn witnesses to give false evidence against the prisoner. 7 Howell, St. Tr. 1400. So, in the *Queen's* case, (2 Broderip & Bingham, 310, 6 E. C. L. Rep. 160.) it was held, by all the Judges, in answer to a question propounded by the House of Lords, that when a witness, in support of a prosecution, has been examined in chief, and been asked in cross-examination, as to declarations and acts of his, to procure persons to give evidence in support of the prosecution, it is competent to the party accused to examine witnesses in his defence, to prove such declarations and acts in contradiction of the witness, but not so, if the first witness had not been first cross-examined on that point. See, also, 1 Phillips' Ev. (4th Am. ed.) 295; and *Meagoe* v. *Simmons*, 3 C. & P. 75.

So, the conduct of a witness, shewing a bias in favor of a party calling him, may be shown to lessen his credibility. *Daggett* v. *Tallman*, 8 Conn. Rep. 168; 1 Starkie on Ev. 129, 1830.

So it was held, in *Atwood* v. *Welton*, (7 Conn. Rep. 66,) that a witness, on his cross-examination, may be inquired of, whether he had not had a controversy with the party against whom he testified, and whether he has not threatened to be revenged on him, for the purpose of discrediting his testimony; and if his answer is in the negative, it may be contradicted by other witnesses. The inquiry is not collateral, but most important to show the motives and temper of the witness in the particular transaction. The witnesses, state of mind, and interest in respect to the party, are always pertinent, because they go to his credibility. 16 Mass. R. 185; Swift's Ev. 148; 1 Star. Ev. 135; 19 J. R. 115, 123; 4 Wend. 420; 1 Cow. and Hill's Notes, 765; 4 Leigh, 330; 1 Excheq. R. 90.

The case of *The People* v. *Genning*, (11 Wend. 18,) in which it

was held, that the prisoner could not prove that the prosecutor had frequently offered to leave Court, and not appear as a prosecutor, if the prisoner would settle the subject matter of the indictment with him, was so decided, on the ground, that if it was true, yet it would not, in the slightest degree, influence the Jury, or impeach the testimony of the witness. On that ground, the case was properly disposed of, on principle; but I exceedingly doubt the correctness of the assumption, that it could not legitimately affect the testimony of the witness. It might be quite material, on the question of the prosecutor's motive in prosecuting, and whether he had not adopted that mode of attack, in order to procure money.

But, in the present case, the offer was, to prove that Miller, the principal witness for the plaintiff, had attempted to suborn another person to swear falsely in the cause; and it seems to me, no stronger evidence could possibly be adduced, to show the motives and feelings of the man, than this evidence, and I am of opinion a new trial should be granted, with costs to abide the event.

New trial granted.

Supreme Court of Pennsylvania, October, 1852.

IN RE NATHAN RAMSEY'S ESTATE.

1. Where R., who died in 1837, had executed a will in 1819, wherein he devised one-half his real estate "to his legal and natural *heirs* and their heirs forever, to be divided among them in equal shares, to be share and share alike." *Held*, that only those who would have been *heirs* under the act of 1833, came within the description, and therefore, that children of deceased nephews and neices did not take.

2. Under a devise to "heirs," the estate vests in those who answer that description at the time of the death of the testator. Where a term of known legal signification is used, the Courts will consider that the testator used that term in that recognized sense, and will so construe the will.

Error from Orphans' Court of Cumberland County.

The facts are stated in the opinion of the Court.

LEWIS, J.—The will of Nathan Ramsey was executed on the 8th of October, 1819, and the testator died in 1837. He devised the half part of his real estate "to his legal and natural heirs and their heirs forever, to be divided among them in equal shares, to be share and share alike." If the testator had died in 1819, at the time of making his will, the children of his nephews and neices would have answered the description of "heirs," under the law then existing. But at the time of his death, in 1837, they did not answer that description, inasmuch as the act of 1833 abolishes the right of representation among collaterals, after brothers' and sisters' children. And the question in this case, is whether the decedent intended to give his estate to those who would answer the description of "*heirs*," according to the law existing *at the time of making the will*, or to those who were recognized as heirs by the law in existence *at the time of his death*,

It cannot be pretended that the estate was given to those who would have been his heirs had he died at the time of making the will. Such a construction would defeat the children of Richard Wood altogether. He was living at the date of the will, but died before the testator, and the latter died before the enactment of the statute of 1844, which, under other circumstances, might have saved a devise to Richard Wood from becoming void by his death before it vested.[1] And the effect of this construction would be to give to each of the nephews, and the children of nephews, a share equal to the share of the testators own brothers and sisters. This could scarcely be supposed to accord with his intention, for the latter were nearer in degree to the testator, and may fairly be presumed to have been the preferred objects of his bounty. In the case of a testator who was married, a still more startling effect might be produced by such a construction. Children might be born afterwards; but these would be entirely excluded, because they were not in existence to answer the description of "*heirs*" at the time required by this construction; and the whole estate would thus go to collaterals in remote degrees, who happened to answer the description of "heirs" at the time of making the will.

[1] But see Martindale *v.* Warner, 3 Harris, 471.

This construction is, therefore, entirely inadmissable. It is clear, that the testator looked to the *time of his death*, as the period *when the estates were to vest.* But the main question still remains: What individuals were intended to take them? Those who filled the description of "*heirs*" according to the law existing *at the date of the will*, or those who answered that description under the law existing at the *death of the testator?* The intention must control.

There can be no "heirs" in the life of the ancestor, and the use of this term is a strong indication that he had no particular persons in view as the favorite objects of his bounty, and that he looked to the period of his death as the time for ascertaining the persons who were to take under that description. When he made use of a term of known legal signification, and one which cannot, according to the rules of law, apply to any persons but those who answer that description at his death, we are bound to believe that he used the term in its legal sense, unless there is something in the will to indicate a contrary intention. Smith's Executory Int. sec. 211, part 2, ch. 2. We have no right to interpolate a word for the purpose of reading his will as a devise to the *presumptive heirs*, and thus deprive the "legal heirs" of the estate expressly devised to them. In *Baskin's Appeal*, 3 Barr. 307, it was decided that the statute of distribution is to be resorted to, in the case of a bequest to "all the heirs," for the purpose of ascertaining "who are to take, and the quantum of the estate." In Powell on Devises, 282, n., the rule is stated, that "where a devise or bequest is simply to a testator's 'next of kin,' it vests in those who sustain the character *at his death.*" And the same rule prevails even where the devise is to a person for life, or for any other limited interest, and afterwards to *the next of kin.* Powell on devises, 284, n., 1 Cox, 131; 3 B. C. C. 234, 4 ib. 207; 3 East. 278; 3 Mer. 689. Where words of general description are used, they must be considered as referring to *the death of the testator*, "unless by the context, or by express words, they plainly appear to be intended otherwise." Powell on devises, 286, n.; Smith's Ex. Int., s. 214, pt. 2, ch. 2. In the will before us, there is nothing to take the case out of the general rule of construction. And it is important to the peace of society, and to the

stability of titles, that we should not, for light causes, depart from the general rule of construction, which, under a bequest or devise to "*heirs*," gives the estate to those who answer that description at the death of the testator.

It is ordered and decreed, that the decree of the Court below, ordering the decree of the 12th February, 1850, to be so amended "that the complainants (below) receive from the executor of the testator the sum of $74,00¾, with interest from the 12th February, 1850," be reversed.

And it is further ordered and decreed, that the decree of the 12th February, 1850, be affirmed.

Supreme Court, Pennsylvania, September, 1852.

THE NEW YORK AND ERIE RAILWAY *v.* SKINNER.

1. An action on the case for negligently conducting a Railway train may be maintained; as to what constitutes negligence, *quære.*
2. A Railway Company is a purchaser for valuable consideration of the exclusive use of the land, over which the track is laid, as an incorporeal hereditament, and may use thereon the greatest allowable rate of speed, without interference from strangers.
3. By the common law of Pennsylvania, as well as by the common law of England, the owner of cattle is bound to keep them within his own custody at his peril, though he may let them go at large without incurring liability from entry on unenclosed woodland or waste field, and this because of the peculiar circumstances of the people here.
4. A judge's charge to a jury must be accurate, not only in its outline, but also in its detail, or this court will reverse on error.
5. The principle in Simpson *v.* Hand, 6 Whart. 311, affirmed and enforced.
6. A Railway Company is responsible only for negligence or wanton injury, and the owner of cattle killed or injured on their track, can have no recourse to the Company or its servants;—and such owner is liable for damages done by his cattle to the Company or its passengers.

Error to the Court of Common Pleas, of Susquehanna County.

The plaintiff below declared against the defendant, in trespass on the case, alleging that in consequence of the negligence of the de-

fendant's servants in conducting and running their engine and cars on their railway track, the engine ran upon and over a cow of the plaintiff, and killed her.

It appeared on the trial that the cow in question was at large, on a narrow piece of unenclosed land, between the railroad of defendant and the public highway, about sunset of one day in May or June, 1849, when the mail train came along, running up to their regular time of twenty-five to thirty miles per hour. When about one hundred yards distant, the cow was seen and the whistle was sounded, the engine reversed, and signal given to brake; but the cow sprang on the track and the engine ran on to her, and one or two cars were thrown partly off the track.

Defendant's counsel requested the Court to charge the jury "that if they believe that the plaintiff's cow was suffered to stray upon the public highway, and that from thence she came upon the railroad track of the defendant, and was there run over and killed by their locomotive engine, the plaintiff cannot recover, even though there were negligence on the part of the defendant.

"That the plaintiff's cow, under the evidence in this cause, was trespassing on the land and railroad track of the defendant, and therefore the plaintiff cannot recover, even though there were negligence on the part of the defendant."

The Court, JESSUP P. J., declined to charge as requested, and this was assigned as error.

Mr. J. T. Richards, for the plffs. in error, cited *Fort* v. *Wisnell*, 14 Johns. 304, *Plater* v. *Scott*, 6 G. & J. 116, *Travis* v. *Smith*, 1 Barr. 234, *Bush* v. *Brainard*, 1 Cow. 78, *Rust* v. *Low*, 6 Mass. 94, *Vanderplank* v. *Miller*, M. & M. 169, *Barnes* v. *Cole*, 21 Wend. 188, *Rathburn* v. *Payne*, 19 Id. 399, *Wynn* v. *Allard*, 5 W. & S. 524, *Simpson* v. *Hand*, 6 Whart. 320, *Tona. R. R.* v. *Munger*, 5 Denio, 255, *Knight* v. *Abert*, 6 Barr. 472.

September 27, 1852. The opinion of the Court was delivered by

GIBSON, J.—An action for such an injury as is laid in this declaration, is founded on negligence, of which there was not a particle of proof at the trial. The company was using its chartered privilege in

the usual way, and its act was lawful. Doubtless an action on the case may be maintained for negligence in conducting a railway train as well as in conducting any other vehicle, as was ruled in *Bridge* v. *The Grand Junction Railway*, 3 M. & W. 244; but what is such negligence has not been entirely determined. In *Aldridge* v. *The Great Western Railway*, 4 Scott, N. R., 150, S. C. 1 Dowl, N. S. 247, an action was maintained for suffering sparks to fly from the engine to a bean stack; and this is all we have for it in the shape of decision. No doubt a company is answerable for gratuitous damage, but what evidence was there of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed: that it was within three hundred feet of the spot where the cow jumped suddenly from the ditch to the track: that the engine was instantly reversed, and the signal given to brake; and that alacrity could do no more. The retropulsive power at the disposal of the engineer was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without periling the passengers. Granting what one of the witnesses testified, that the cow might have been seen at the distance of fifty rods by the way side, and granting that the train might have been stopped within it; yet the engineer was not bound to stop it.[1] He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her.

But high above this stands the impregnable position, that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest allowable rate of speed, with which the person nor property of another may interfere. The company on the one hand, and the people of the vicinage, on the other, attend respectively to their particular

[1] See a curious case in North Carolina, Herring *v.* the Wilm. and Ral. Rail Road Co., 10 Ired. 402, where *two slaves*, who were lying asleep across the track, were killed by an engine passing over them. It was held that the fact of the killing did not raise a presumption of negligence; for inasmuch as the slaves were reasonable beings, the driver of the engine might presume they would get out of the way.—*Eds. Am. L. Reg.*

concerns, with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of any assemblage of those loitering or vagabond cattle, by which our railways are infested. Any other rule would put a stop to the advantages of railway travelling, altogether. And, for what deprive the country of one of the best improvements of this most wonderful age? For no more than to enable a few unpastured cows to pick up a scanty subsistence in waste fields and lanes. If the bullocks, cows, horses, sheep, or swine of the neighborhood, were allowed to block the way, the prohibition of intrusion by drovers or travellers using their own means of conveyance, would be of little use. For the sake of the company and the passengers, the conductor and subordinates will be vigilant to remove obstructions; but the protection of the property is merely incidental. If the owner of it do not attend to it, the company's servants, having their own business to mind, are not bound to do so; and he who trusts his property to the chances of accident, is bound to stand the hazard of the die. *Knight* v. *Abert*, 6 Barr. 472, is to the point. In that case the intrusion was on wood land; in this it was on the exclusive possession of ground paid for as an incorporeal hereditament.

So far, we have treated the case as if the plaintiff's skirts were clear; but they are not. By the Common Law of England, an owner of cattle is bound to keep them in an enclosure, or in custody, at his peril; for every entry by them on another's possession, is a trespass; by the Common Law of Pennsylvania, he may let them go at large without incurring liability for an entry by them on woodland or a waste field.—To entertain an action for inappreciable injury, would encourage vexatious and unprofitable litigation, and be contrary to the maxim *de minimis*, which is peculiarly appropate to the circumstances of the people here. But if such an intrusion would occasion substantial damage, the English rule would be applicable to it, on the principle that the owner of a bull which has gored another's ox, must pay for it. Is not the intrusion of an animal on the railway, which has a direct tendency to throw a train

off the track and endanger life and member, an injury to persons involved in the risk? It is conceded that an American company is not bound to fence its railway, as an American farmer is bound to fence his fields, and this shows that persons who suffer their cattle to go upon it, do so on their own responsibility. Every English railway is fenced—not to protect it from cattle, for none are at large; but to prevent detriment or detention from other causes. In a country so new and so sparce as ours, of which the trunks of the principal railways are more extensive than the Island of Great Britain, the cost of fencing them would be greater than could be borne. The rights and responsibilities of a people are shaped by the circumstances of their condition. If they will have railways, they must be content to have them in the only way they are practicable: and the English rule must be applicable to them. If an owner suffer his cattle to be at large, it must be at the risk of losing them or paying for their transgressions. The very act of turning them loose, is negligence, as regards any one but an owner of a forest or waste fields; and the owner of them is consequently responsible to every one else. That he is not answerable for them to a railway company criminally, like a caitiff, who has laid a log or a bar across the track, is because mischief was not intended by him. But no prudent man in his predicament, would be the first to make a stir about it.

The charge was accurate in its outline, but not in its detail. As has already been said, there was no evidence of negligence on the part of the defendant, yet the existence of it was left to the jury as a debatable matter. In another part, he even took the fact for granted. "The simple fact," he said, "of permitting for a limited time, the cow to wander on the Railroad, would not of itself, be such negligence as to excuse all negligence on the part of the defendant." Had there been evidence to raise the point, the direction might have been well enough; but the application of the principle in the particular instance, was wrong. In *Sills* v. *Brown*, 9 C. & P. 605, it was ruled that in cases of accident with carriages or ships, mutual negligence, *if contributive to the injury*, bars an action

for it—a principle enforced by this court in *Simpson* v. *Hand*, 6 Whart. 311.—But it was erroneous to predicate it of a case in which the negligence was all on the side of the plaintiff. He further charged, "That if the plaintiff *knew* his cow was wandering on the railroad, it was his duty to drive her therefrom. He had no right to suffer her to be there; and if he suffered it, knowing her to be there, he was guilty of such negligence as would prevent his recovering. But if his cow casually wandered away, ordinary care being used to restrain her, the simple fact of her being on the track would not excuse the defendant's negligence." Now the making of this gratuitous imputation of negligence and the ignorance of the cow's whereabout, turning points of the cause, is the root of the error. As loss of the property is not a penalty for the owner's supineness in the care of it, of what account is his ignorance of its jeopardy.

The irresponsibility of a railway company for all but negligence or wanton injury, is a necessity of its being. A train must make the time necessary to fulfill its arrangements with the Post Office and the passengers, and it must be allowed to fulfill them at the sacrifice of secondary interests put in its way; else it could not fulfill them at all. The maxim of *Salus populi* would be inverted; and the paramount affairs of the public would be postponed to the petty concerns of individuals. Every obstruction of railway is unlawful, mischievous and abatable at the cost of the owner or the author of it, without regard to his ignorance or intention. It may seem cruel to make a dumb beast suffer for the fault of its owner; but it must be remembered that the lives of human beings are not to be weighed in the same scales with the lives of a farmer's or a grazier's stock; and that their preservation is not to be left to the care which a man takes of his uncared-for cattle. Allowing them to prowl for their food, he may not wash his hands of the consequences of it. In a country so obnoxious to the charge of indifference to human safety, it is a high and holy charge of the Courts to hold to their duty, not only those to whom it is immediately committed, but also those by whose defaults it may be remotely endangered; and to hold them hard. We are of opinion that an owner of cattle killed or injured on a railway, has no recourse to

the company or its servants; and that he is liable for damage done by them to the company or its passengers.

Judgment reversed.

NOTE.—According to the well and long established principles of the common law, the owner of a close is not obliged to fence against the cattle of the occupant of an adjoining close. Every man must keep his cattle on his own land, and prevent them from wandering on that of his neighbor. It is true, that no man is bound to fence his land, in the absence of statute regulation or prescription, against an adjoining field, but he is bound to keep his cattle upon his own close at his own peril, and a fence has been found the most convenient mode of so doing, and hence, in well settled districts in this country, even in the absence of statutes, has been generally adopted. Further, if a man be bound to make fences, his duty extends only as against his immediate adjoining neighbor, or some person having an interest in the contiguous close, but not as against strangers; and hence, if the cattle of a mere stranger escape into the close, from defect of fence, trespass lies.[1]

A man has a right to drive his cattle along the highway to market, or to and from his pasture ground; and in doing so, they may wander out of the lines of the road and get upon adjoining lands that are not protected by front fences; and perhaps such vagabond movements of the cattle would hardly amount to a trespass, or at any rate, would fall within the principle *de minimis;* or, if a litigious plaintiff should bring an action, he would recover only nominal damages. But, as between the landholder and a stranger, in the absence of statute regulation, or custom or covenant, the landholder is not subjected to the *onus* of putting up a fence to protect himself against the cattle of one living at a distance, whose land does not adjoin his own, and who chooses to pasture his cattle on the highway at the public expense and annoyance, and who does not choose to keep them on his own close. Between such landholder and cattle owner there is no mutuality that requires the former to protect himself against the latter, and the latter would undoubtedly be liable for every injury the cattle might commit, either in an action of trespass, or by distress *damage faisant.*[2]

[1] See the old books and cases cited in Rust *v.* Low, 6 Mass. R. 90.

[2] Chambers *v.* Mathews, 3 Harr. N. J. Rep. 368; Coxe *v.* Robbins, 4 Halst. 385: Lord *v.* Wormwood, 22 Maine, 282; Vandegrift *v.* Redeker, 2 Am. Law Jour. 118, S. C. 2 Zab. N. J. Rep. 183; Stafford *v.* Ingersoll, 2 Hill, N. Y. 38; Lyman *v.* Gibson, 18 Pick. R. 427; Dovasten *v.* Payne, 2 H. Black, 527; Rust *v* Low, 6 Mass. 90; Stackpole v. Healy, 16 Id. 33; Tonawanda R. R. *v.* Munger, 5 Denio, 267, per Beardsley, Ch. J.; Wells *v.* Howell, 19 Johns, 385; Bush *v.* Brainard, 1 Cow. R. 79, *note;* Clark *v.* Brown, 18 Wend. 213; Little *v.* Lathrop, 5 Greenl. R. 356; Gale and Whateley's Law of Easements, 297. The following general proposition is deduced by Judge Cowen, as the result of a careful examination of the authorities: "Every man is bound, under peril of being accounted a trespasser, to keep such animals as are the subject of absolute property, upon his own soil." See 1 Cow. Rep. 91 *note.*

It is said the common law on this subject has never been in force in Illinois, and that the owner of a close must have it fenced in order to maintain an action of trespass for injury done by cattle. See Seely *v.* Peters, 5 Gilman, 130. Caton, J., however *dissented.*

If cattle trespass on improved land, which is not surrounded by a statute fence, the owner of the land may drive them off, and may set a dog upon them, providing he is not wanting in ordinary care and prudence, either in the size or character of the dog, or the manner in which he pursues them. Clark *v.* Adams, 18 Verm. 425.

The application of these principles to railways is not difficult. It is the duty, and it is a duty for which an action would lie, or an indictment might be found, of a railway company to construct their track and run their locomotives and cars over that track in such manner and at such speed as the wants of modern commerce and social improvement demand. And if in the progress of things, a new and powerful agent, such as steam, is subdued by man's genius to become a useful and active laborer in his behalf, all that can reasonably be required of one, who uses an agent so potent and so dangerous, is to exercise all reasonable skill to prevent injury to the property of third persons. Engines and cars in rapid motion are lawfully passing over their appointed pathway. This pathway is owned by the railway corporation, either in fee, or it is liable to a servitude or easement, which, practically, is the same thing. The land upon which the road is built, is as fully the property of the corporation as the land of an adjoining owner on which he grows his wheat, or mows his grass. And the same principles of law must be applied to each. In the absence of statutes or covenants, or prescription, the railway company is not bound to fence in their land, and in long lines of railway in a new and thinly peopled and ill timbered country, the expense would be intolerable and the outlay comparatively useless.[1] The owners of adjoining lands and strangers are bound to keep all cattle off the railway track, as much as they are bound to keep them off of each others farms; and should they fail to do so, they must respond in actions for all consequent injury.[2]

[1] It has been held in Maine, that the fact that a railroad company have built fences along the line of their track against the land of an adjoining property holder, is not of itself evidence of any obligation on the part of a corporation to either erect or maintain fences for the benefit of such adjoining landholder. Morse *v.* The Boston and Maine R. R. Co. 2 Cushm. 536.

[2] Vandegrift *v.* Redeker, 2 Am. Law Jour. 116, S. C. 2 Zab. 183; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 258; Perkins *v.* The Eastern R. R. Co., 29 Maine, 304; Clark *v.* The Syracuse R. R. Co. 5 Month. Law Rep. 277; 11 Barb. Rep. S. C. "The railroad track, when appropriated, is not subject to the same rules as ordinary highways; the company has the exclusive use of the land for the purposes of their incorporation. The owner of the fee retains no right to the use or occupation of the ground for pasture or otherwise. The object and scope of the appropriation is wholly inconsistent with the owner retaining any rights or interests in the use of the land during the period for which it is appropriated." Per Bennett *arguendo*, 4 Comst. R. 356–7, and per Hurlbut, J., p. 357.

District Court, City and County of Philadelphia, September, 1852.

JOEL CADBURY *v.* CATHARINE DUVAL.

1. A creditor by Judgment, though for contemporaneous advances, is not a purchaser within the Recording Acts, nor is he protected against a trust of which he has had no notice.
2. Trustees for the payment of debts under a codicil to a will, conveyed land to D. the testator's widow and executrix, who had been given a life estate therein by the will. The conveyance was nominally for value, but in fact no consideration passed, and it was merely made for the purpose of vesting the legal estate in D. to enable her to raise money to pay the testator's debts. The widow gave a mortgage on the property, under which it was sold. *Held*, that the land was bound by the trust in the hands of D., and that her judgment creditors, standing in no better position than herself, were not entitled to be paid out of the proceeds remaining after the payment of the mortgage, as against the creditors of the testator.

James S. Duval, by his will, dated the 18th of March, 1842, after certain specific devises to his children and grandchildren, bequeathed to his wife Catharine Duval, the rest of his property and estate; the rents and profits thereof, after paying his debts, to be appropriated to her support during her lifetime; and over the surplus of the said rents and profits, over and above her support, if any, he gave his wife a power in trust for distribution among his children and heirs, the terms of which are not material. He also appointed his wife executrix. By a codicil of the 22d of March, following, Mr. Duval devised all the residue of his real estate wherever, situated, subject to the life estate therein of his wife, to trustees in trust to sell, then to apply the proceeds first to the payment of any of his debts, to which the same might be subject, "and *is* not otherwise provided for," and then to distribute the surplus among his children.

The testator died in the same year, and on the 27th of the succeeding December, the Trustees under the codicil, executed a conveyance of certain of the residuary real estate, in fee, to Mrs. Duval, reciting the receipt of an actual money consideration to a large amount.

As will appear hereafter, however, nothing was actually paid by Mrs. Duval, and the sole object of the conveyance was to put the legal title in her, thus merging her life estate, to enable her in her personal character to raise money to pay the testator's debts. In February, 1843, Mrs. Duval mortgaged the land thus conveyed to her, to secure a bond for $7,000, to William Parker. Subsequently to this mortgage, and between the years 1844 and 1847, a number of judgments were recovered against Mrs. Duval, for debts contracted by her *personally*.

In March, 1848, Parker's mortgage was sued out, part of the land sold, and the proceeds paid into Court. The question arising whether the mortgage, or creditors of Mr. Duval, who had obtained judgment within the five years, were entitled to the money, the Court awarded it to the former; and this decision was affirmed on appeal, and may be found in 10 Barr. 268. A *pluries levari facias* was then issued (in 1850,) and the remainder of the mortgaged premises sold. The fund thus produced was also paid into Court, and referred to an Auditor, who reported that after the discharge of the balance due to Parker, the fund was claimed on the one hand by the creditors of Mr. Duval, and the judgment creditors of Mrs. Duval, on the other, and that the latter had demanded issues. These issues, as subsequently settled, were in substance as follows:

1st. Whether for the conveyance by the trustees to Mrs. Duval, any money consideration passed between the parties.

2d. Whether the sole object of the conveyance was, by putting the legal title in her, to enable her to raise money to pay the debts of the estate.

3d. Whether there was before, and at the time of the conveyance, a verbal agreement and private understanding between the parties, that after the arrangement had been accomplished, Mrs. Duval should re-convey to the trustees her legal estate for the purpose of the trust.

4th. Whether such re-conveyance was ever made.

5th. Whether the judgment creditors of Mrs. Duval, had at the

time their respective claims became judgments, notice or knowledge in fact of the verbal agreement and private understanding.

Upon the trial of the issues, the jury found the second of them in the affirmative, and the rest in the negative.

Rules were thereupon obtained to shew cause why the creditors of Mr. Duval should not take the money out of court, which were argued by

Mr. *T. I. Wharton*, for the rules.

Mr. *W. S. Price*, Mr. *Kennedy*, and Mr. *Horn*, contra.

The opinion of the Court was delivered by

HARE, J.—James Duval devised certain land to his wife Catharine Duval, for life, by his will. By a subsequent codicil, he devised the same land, subject to her life estate, to his sons-in-law, in trust to sell it, and after applying the net proceeds to the payment of his debts, to distribute the surplus among his children. This devise passed a reversionary interest to the trustees, subject to an express trust for the payment of the testator's debts, and a life estate to Mrs. Duval, charged with a lien for the same debts by operation of law. Subsequently the trustees conveyed the interest devised to them to Mrs. Duval, by a deed, which purported to be in consideration of $7,000. Had this consideration been real, the deed would have been a full execution of the power, and would have discharged the land from the trust, and passed a clear and unincumbered title to the grantee. In point of fact, however, no money was paid, the object of the conveyance being to enable Mrs. Duval to execute the trust declared by her husband, to the best advantage, by selling her life estate, as well as the residuary interest devised to the trustees. The trusts, therefore, survived the conveyance, and bound the estate in her hands as if no conveyance had been made. For nothing is better settled than that a conveyance will not defeat a trust, unless the grantee buy without notice, and for value; and here the grantee gave no value, and was indisputably affected with notice. The land was afterwards mortgaged by Mrs. Duval, and subsequently sold under a *levari facias*, issued on the mortgage. The Supreme Court decided, when the case was before them, that although the

trust bound the land in the hands of Mrs. Duval, it did not bind the mortgagee, who was a *bona fide* purchaser for value. He accordingly received the amount of the mortgage out of the proceeds of the sale, and the question now is, as to the proper distribution of the residue, which is claimed on the one hand by the creditors of Mrs. Duval, and on the other by those of her husband. This question seems to admit of a plain and easy solution. The general rule is, that the rights of those who claim by a derivative title, rise no higher than the rights of the person through or under whom they claim. Thus, the purchaser of Real Estate has to submit to the defects of the title of the grantor, and cannot protect himself by showing that he bought in ignorance of their existence. The purchaser of a chattel, cannot ordinarily resist a suit brought by the rightful owner, even where the vendor was in possession of the chattel at the time of the sale, and held himself out as the owner. And the assignee of a chose in action, is well known to be bound by all equities which bind the assignor. When, however, a purchaser parts with value on the faith of the legal title of the vendor, he is not bound by equities of which he had no notice at the time of the purchase. This exception to the general rule is as well settled as the rule itself, and is necessary to prevent the refined and intricate system of trusts, which are obligations of conscience, rather than rights of property, from becoming a clog and burden on the free transmission of property from hand to hand.

What we are to determine in this case, therefore, is whether the Judgment creditors of Mrs. Duval come within the exception or within the rule; whether they claim merely through and under her, or have a new and superior title, which puts them in a better position than she occupies.

That she could not claim this fund for her own purposes, as against her husbands creditors, is evident; that she could not apply it to pay her debts to the exclusion of his debts, is also evident, and the question simply is, whether her creditors can insist on applying it to a purpose to which she could not apply it herself. Now it has been settled by a train of decisions in England, which come down from the origin of Equity there, and has been repeated and established

in this country by other decisions which extend as wide as the country itself, that a Judgment creditor is within the rule and not within the exception; that he has the rights of the debtor, and has no more, and that he cannot compel the debtor to disappoint the prior and superior claims of others in order to discharge the debt. In other words, it is settled that a Judgment Creditor is neither a purchaser in the technical or limited sense in which the term is used in equity, nor in that in which it is used in the recording acts of this country, and must stand or fall by the real, and not by the apparent rights of the defendant in the judgment. It is, however, contended that a judgment obtained for an antecedent debt, and one given for contemporaneous advances, are on different footing, and that the one should be viewed in the same light with a Mortgage, whatever may be the effect of the other. One answer to this is, that a man who advances money to another, has a right to dictate the security, and that if he choses to accept a Judgment which will bind all the property of the debtor, whether more or less, instead of a mortgage, which only binds that which is specially mortgaged, he must abide by his choice, and cannot afterwards invest either mode of security with the attributes of the other. And a better answer is, that if a creditor ask for a mortgage of that which really belongs to others, though apparently to the debtor, he will not obtain it unless the latter is prepared to commit a fraud, by pledging the propery of third persons specificially, for his own debts. When a debtor has committed such a fraud, a creditor who has parted with value in good faith, and in reliance upon the fairness of the security, may enforce it, but when the debtor has not, and perhaps would not, misappropriate the property entrusted to him for others, to his own purposes, shall the law, which is supreme reason and justice, step in to commit a wrong which the parties themselves have avoided. The case of *Struthers* v. *Peltz*, recently decided by the Supreme Court, is relied on as establishing a different rule, and as showing that a judgment creditor may have the rights of a purchaser. Were that case more nearly in point than it is, it would not justify us in disregarding the uniform course of decision in this State, sustained by the whole weight of authority elsewhere.

But the question in that case was not as to the right of a Judgment creditor to compel the application of a trust fund, to the payment of the judgment in derogation of the rights of the *cestui que* trusts, but as to whether an antecedent lien, which had been released by executors, to whom the law gave the right to release it, could be set up by equity against a subsequent judgment, and for the benefit of legatees and not of creditors. The release of a debt stands on a very different footing from the conveyance of an estate, and legatees whose claims originate in the bounty of the testator, and derive their existence from his will, cannot be viewed in the same light with creditors whose demands are paramount to the will, as well as sanctioned by it. We therefore award the fund in Court to the creditors of James Duval, and direct that it be distributed among them *pro rata.*

Court of Appeals, Kentucky, October, 1852.

THOMAS POWELL *v.* THE FIREMEN'S INSURANCE COMPANY.

1. It is not necessary to sustain a bill in Equity for the correction of a mistake in a sealed instrument, that there should have been a previous application to, and refusal by the defendant to cure the defect.
2. Where a vessel has been stranded before the expiration of a policy of insurance on her, though the principal part of the damage, as the expense of getting her off, has been incurred subsequently thereto, the insured is entitled to recover for the whole loss suffered by him.
3. Negligence or unskillfulness in the master or crew, not amounting to barratry, will not avoid an insurance, where the loss has been immediately occasioned by a peril insured against.
4. Where a steamboat is insured for the navigation of a particular river, as the Mississippi, and not from port to port, the rules as to deviation do not apply; and therefore, that a loss has been incurred while the boat has been running in an unfrequented, though navigable channel of the river, will not affect the policy.
5. A surety in a forthcoming bond, given on the attachment of a vessel, in a suit between the owners, has an insurable interest in her.

Appeal from the Louisville Chancery Court, PIRTLE CH.

The following abstract of the facts and opinion of the Court in this important case, has been furnished by a competent authority.

The Steamboat Mohawk having been seized by virtue of an attachment, issued from the Louisville Chancery Court, at the suit of a part of the owners against the others, the defendants executed a bond in the penalty of $16,000, conditioned to have the boat forthcoming, to abide the decree that the Court might render in the cause, with Thomas Powell as one of their securities.

Powell obtained from the Insurance Company, a policy on the boat; having apprized the Company of his suretyship.

The boat was grounded in attempting to run a *chute* of the Mississippi river; and Powell, in order to have her got off, (for the water fell, and she had to be relaunched,) so that she could be forthcoming, according to his bond, incurred expenses amounting to several thousand dollars, including wages, board, &c., of persons superintending and laboring.

The suit was brought in Chancery on an alleged mistake in the policy. The mistake was acknowledged, but the jurisdiction was denied, because the Company said it was always ready to correct the mistake, and no application therefor had ever been made.

The Court sustained the jurisdiction, and decided that it was not necessary to transfer it from a court of law to a court of equity, that there should have been a refusal to correct the mistake.

The greater part of the outlay for the getting off of the boat from the grounding, was after the time of the policy had expired. But the Court held that the loss was within the policy, as the grounding happened before the time expired; and the grounding was within the policy; and the damage for it was not confined to the injury done to the boat itself.

It was contended that the boat had been run by negligence and unskillfulness, upon a bar in a *chute* of the river, where no prudent person would run a boat, and out of the usual place in navigating the Mississippi river.

The Court of Appeals found that it was negligence to some extent in the pilot, to run the boat in the *chute*—that the main channel was the ordinary place of running boats at that stage of water; but went on to make these remarks: "But if it be conceded that the grounding of the boat was occasioned by the negligence, or mis-

conduct of the master and crew, it would not follow that the loss is not covered by the policy. If the misconduct had been wilful and fraudulent, or the negligence so gross as to bear a fraudulent character, it would amount to barratry; and the insurers would not be responsible for the loss, unless the policy covered the risk of barratry. The assured is bound to provide, in the outset, a competent master and crew, but such master and crew, when once provided, are, to some extent, the agents of the underwriters as well as of the assured, in relation to their conduct in the navigation of the boat; and if a loss occur in consequence of their negligence, or other misconduct, which does not amount to barratry, the underwriters cannot impute the fault to the assured, who performed his duty in providing a competent master and crew in the first instance. The loss in this case was directly occasioned by one of the perils insured against. If its remote cause was the mistake, or imprudence of the pilot who had the management of the boat at the time, the fault is not attributable to the assured, and there is no good reason why it should not be covered by the policy. Barratry is itself regarded as a peril, and is not covered by a policy in which it is not expressly insured against. Not so, however, with respect to mere negligence, or misconduct, not amounting to barratry: and, therefore, the underwriters are liable for a loss by any of the perils in the policy, of which such negligence or misconduct may be the remote cause.

"Opposite opinions upon this point have been expressed by different Courts, and for a time it was regarded as a vexed question; but the weight of modern authority, as well as the force of argument, seems to us to sustain decidedly the position we have assumed. *Waters* v. *Merchants' Louisville Insurance Company*, 11 Peters, 213; *Perrin* v. *Protection Insurance Company*, 11 Ohio, 147; *Sadler* v. *Dixon*, 8 M. & Welsb. 895; *Shore* v. *Bentall*, 14 Serg. & Rawle, 130; *Bishop, &c.* v. *Pentland*, 8 B. & C. 219."

It was contended, also, that there was a deviation, and, in consequence, no liability. To which the Court replied: "The doctrine upon the subject of deviation has arisen and been generally applied, in cases where the insurance was on a particular voyage. Here the

insurance was not upon a voyage from one port to another, but upon the navigation of certain designated rivers, for a fixed period. The rules applicable in the former case, would seem to have but little application in the latter. But if an act can be committed in navigating the rivers covered by the policy, which by varying the risks insured against, would amount to a deviation, and discharge the underwriters from liability for a loss occasioned thereby, it would not consist merely, as in this case, in going out of the direct and usual channel of navigation, and attempting to pass over a less frequented, but nevertheless navigable part of the river. If a boat were to run into a part of the river known not to be navigable, and where boats never ventured, the risk incurred might be considered as one not contemplated by the parties, and the loss, if one happened, as one for which the underwriters were not liable. And if this act were done without any reasonable cause, or apparent necessity, it might amount to barratry, as it would furnish at least *prima facie* evidence of wilfull and fraudulent misconduct on the part of the officers of the boat. Bnt the act complained of here, consisted merely in taking the least frequented route, one, however, that the same pilot had passed safely along several times during the same season, and in which the grounding of the boat was entirely accidental, it being manifest from the proof that the boat could, in the then stage of water, have passed the bar safely within a few yards of the place where she grounded. This act, therefore, did not amount to a deviation; and the loss was one for which the underwriters were accountable."

It was further contended that Powell was not legally one of the owners of the boat, and eould not bring this suit against the Insurance Company, in his own name. To this the Court responded: "As he was bound for the forthcoming of the boat, he had an interest in its preservation; and although as one of the bondmen, he did not acquire by the assumption of that liability, any right of property in the boat, either legal or equitable, yet he had such an interest in its safety as authorized him to insure it against the perils of the river; and as he obtained the policy in his own name, having first disclosed to the insurers his relation to the boat, and his re-